Programs Branch User Report

Solicitor General Canada
Ministry Secretariat

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VICARIOUS LIABILITY OF PARENTS FOR ACTIONS OF THEIR CHILDREN WHO ARE FOUND TO BE DELINQUENT

NO. 1985-21

This working paper was prepared under contract in June 1981 for the Research Division and is made available as submitted to the Ministry. The views expressed are those of the author and are not necessarily those of the Ministry of the Solicitor General of Canada.

This working paper is available in French. Ce document de travail est disponible en français.

SUMMARY

This paper deals with the liability imposed on parents whose children are adjudged to be delinquent under the Juvenile Delinquents Act, specifically by section 22 of that Act. The section was in the original act of 1908 and has not been significantly changed since 1929.

The major concerns raised by the author with regard to section 22 are; the constitutionality of the section as it appears to impose a civil remedy in a criminal statute; the lack of due process in that an order is made against a parent who is not charged with any offence; and finally the underlying concept of the section that it is appropriate to punish parents if their children are found to be delinquent. In this regard it is noted that section 33 of the Juvenile Delinquents Act does establish the offence of contributing to delinquency and is equally enforceable against a parent as against any other member of society.

Case law revealed that section 22 had been subject to judicial consideration only three times and only once has it's use been upheld by the Appeal Courts. It has never been considered by the Supreme Court of Canada. The major stumbling block to successful use of the section was the lack of due process.

Although the Canadian literature does not deal specifically with section 22, the literature tended to be critical of an informal parens patriae approach and in favour of a due process model of adjudication in the courts. This analysis would not indicate support of the use of section 22. It should be noted that at common law parents are only responsible for torts of their children in very narrow circumstances. The liability imposed by section 22 is much wider than the liability imposed by current tort principles in Canada.

Family court judges interviewed supported the conclusion that the section has very little usage in the courts.

American literature was very critical of the concept of punishing parents for actions of their children. The literature supported compensation orders if made against the juvenile and was not critical of non-punitive intervention by the courts that involved other family members. American tort law has been enlarged by statute to create limited liability in parents for actions of their children. These statutes mainly deal with acts of vandalism by children.

Research of other common law jurisdictions revealed that both England and New Zealand have similar provisions in their juvenile statutes as section 22. Unfortunately no case law or literature was available that evaluated these sections. Scotland on the other hand after careful study eliminated the concept of punishing the parent from their statute by recent amendments to their Act.

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VICARIOUS LIABILITY OF PARENTS FOR ACTIONS OF THEIR CHILDREN WHO ARE FOUND TO BE DELINQUENT

I. INTRODUCTION

This paper deals with the liability imposed on parents or guardians whose children are adjudged to be delinquent under the Juvenile Delinquents Act.[1] The major thrust of the paper is concerned with the liability imposed by section 22 of the Act.[2] Briefly, this section gives a Juvenile Court Judge jurisdiction to order a parent or guardian to pay a "fine, damages or costs," arising from an offence committed by their child. This jurisdiction rests on a finding by the Judge that the parent or guardian "has conduced to the commission of the offence by neglecting to exercise due care of the child or otherwise".

Analysis of section 22 will begin with a consideration of the history of the section. The relationship between section 22 and section 33 of the Juvenile Delinquents Act will then be addressed. Both of these sections create a mandate for the court to deal with parental involvement in delinquent behaviour although, depending on the section used, the status of the parent before the court is radically different. The paper will examine the reported case law which has judicially considered section 22. The use of section 22 by judges will be further commented on in the section of the paper reporting on interviews with Family Court Judges in Ontario and Quebec. The constitutionality of section 22 will be studied along with a review of the current status of parental liability in Canadian tort law. To further examine the concept of vicarious liability of parents for criminal actions of their children, statutes, case law and literature of United States, England, Scotland and New Zealand will be reviewed.

II. HISTORY OF SECTION 22

The Juvenile Delinquents Act originated in the Senate in 1908. It was closely modelled on an Act dealing with juveniles that was passed by the British parliament a year earlier. Section 22, then numbered section 18, was part of the original statute but it received very little attention in debate.[3] Members of the Senate did voice concern about the responsibility of parents in causation of delinquency. This was answered by the motivator of the Bill by reference to the section that is now section 33 of the Act.

When the Bill was debated in the Commons it was given virtually no serious attention.[4] Section 18 (as it then was) received no comment.

In 1929, when The Act was the subject of a number of amendments, section 18[5] was renumbered section 22 and was changed in some significant ways. In the following discussion "section 18" will be used when referring to the original section and "section 22" when referring to the amended section. Section 18 made the imposition of a "fine, damages or costs award" on the parent obligatory if any such order was to be made, unless the parent could not be found or the parent had not conduced to the commission of the offence. By section 22 the imposition of this type of order on the parent became discretionary; the requirement of conducement remained and the onus would appear to be on the Crown to prove that the parents did in fact conduce to the commission of the offence.

The 1929 amended section makes mention of an order of "restitution" but this apparently does not refer to an order made against the parent. The beginning of the section states that the judges may

wish to dispose of the case by ordering "a fine, damages or costs" and then says "whether with or without restitution or any other action". The section goes on to say that an order may be made against the parent but the order against the parent only encompasses "a fine, damages or costs". Thus, it would appear that a distinction is being made between "restitution" and "damages or costs". The Criminal Code by section 655 makes an order of restitution possible; it clearly means restoring property obtained during the commission of the offence to the person entitled to it. Although The Act does not have a specific reference to restitution per se the broadness of section 20(1)(g) "impose upon the delinquent such further or other conditions as may be deemed advisable", could, arguably, include an order of restitution. Therefore, by giving "restitution" in the Juvenile Delinquency Act the same meaning as that used in the Criminal Code, section 22, could be interpreted to mean that the juvenile can be ordered to restore property to the victim and at the same time the parent could be ordered to pay further damages or be ordered to pay a fine to the court or be ordered to pay costs; whether the costs are meant to be court costs or costs of the victim is not specified. Section 22(6) allows the judge to make an order against the juvenile under section 20 even if an order under section 22 is made against the parent. This gives support to the phrase "restitution or any other order" referring only to the juvenile while the remainder of the section deals with orders against the parent.

A new provision of section 22 allowed the Judge to order that the fine, if ordered against the parent, could be in the amount a similar offence would attract if committed by an adult rather than the $25.

maximum set by The Act for fines imposed on juveniles. The 1929 amended section failed to re-enact the provision allowing the court to order that the parent give security for the juvenile's good behaviour.

These amendments were apparently made at the suggestion of people working in the field relayed to the federal government after a large conference on delinquency held the previous year.[6]

When section 22 was debated in the House of Commons, the politicians voiced concern about what they perceived to be a lack of due process afforded to parents by this section. Questions concerning the parents' right to receive proper notice, parents' right to be heard and the quality of proof required to attract liability were raised. Twice during the debate the section was let stand, but it was finally passed as it was felt "there would be no great injustice."[7]

The issue of due process is a very crucial one when considering section 22. Reported case law reveals that the anxiety of the politicans voiced in 1929 was the same as voiced later by the Judges who attempted to use the section (see Part V of this paper) and by judges who are presently sitting in our juvenile courts. (see Part VI of this paper) The due process issue is also an underlying concern when considering the status of the parents before the court as discussed in Part IV of this paper.

III. RELATIONSHIP OF SECTION (22) TO SECTION (33)

The court may react to parental conducement of or actual contribution to delinquent behaviour by reference to either section 22 or section 33 of the present Juvenile Delinquents Act. There are, however, important differences between these two sections.

Section 33 of The Act creates the offence of an adult person contributing to the delinquency of a minor (see Appendix I (c) for complete text of section). Subsection (1) of that section purports to deal with a person who, "aides, causes, abets or connives" ... or "does any act producing, promoting, or contributing" to a child being or becoming a delinquent. Subsection (2) of this section states:

> "Any person, who being the parent or guardian of the child and being able to do so, knowingly neglects to do that which would directly tend to prevent the child being or becoming a juvenile delinquent or to remove the conditions that render or are likely to render the child a juvenile delinquent is liable on summary conviction before a juvenile court judge or magistrate to a fine not exceeding $500. or to imprisonment for a period not exceeding two years or both."

It will be readily observed that this section, particularly subsection 2 creates an identical offence to that alluded to in section 22 The difference between the sections is that s.33 creates a direct offence against the parent while section 22 imposes what could be seen as a vicarious liability against the parent for actions of the child. Section 33, by using words like "knowingly" and "being able to do so" creates the usual criminal standard of strict proof and requirement of the Crown to prove mens rea, i.e. the mental intention of the accused to do the act knowing the act to be wrong. This specificity of terms is not drafted into section 22. Two interpretations are possible: either section 22, by being present

in a Criminal statute prima facie requires proof of mens rea of the parent, or section 22 creates a strict liability type offence.

If the offence in section 22 is one of strict liability then the Crown need only prove that the parents did something or failed to do something that conduced to delinquent behaviour of the child. The Crown need not prove that the parents acted (or failed to act) with the intent to cause the delinquency or that the parents knew that their actions would have that consequence. Strict liability offences are common in provincial offences where the penalty is relatively less severe and the demands of administration of justice require some ease in establishment of guilt, for example offences under the Highway Traffic Act. To interpret section 22 as not requiring proof of intent would, therefore, appear to be inappropriate and wrong at law, however, it is unclear just what is required by the section.

Section 33 creates two separate types of offences; subsection (1) refers to actual commission of acts that may lead to delinquency, whereas subsection (2) deals contributing to delinquency by "neglecting to do that which would directly tend to prevent the child being or becoming a juvenile delinquent..." Section 22 appears to refer more to "omission" than "commission". It specifies that the parent will be liable if the delinquency was conduced to by the adult "neglecting to exercise due care...", however this is followed by the words, "or otherwise" which leaves the issue open to a wide interpretation.

If there needs to be a section that emphasizes to parents that they have responsibility to properly socialize their children and, failing to do so they will be subject to the criminal process, it would seem that

using section 33(2) is more appropriate than using section 22 because of the procedural safeguards and standards of proof required by the former section.

A final difference between the two sections is the penalty provided. A conviction under section 33 will result in a criminal record and possibly a serious fine and/or jail sentence. Section 22 will only result in jail if the monetary penalty can be extracted by no other means and will not result in a criminal record. Section 33 makes no provision for payment to the victim of a delinquency which of course is the essence of section 22.

A study done by Aaron Caplan for the Research Division of the Ministry of the Solicitor General Secretariat considered charges laid against adults under section 33 in all of Canada for the years 1974, 75 and 76.[8] In 1976 1059 adults were charged with Ontario reporting the largest number (409). Caplan provided a detailed analysis of the Ontario charges. He states:

> "Our analysis of those charges that were heard in court reveals that a quarter of these charges do not specify an actual offence; rather the charge is laid under the umbrella phrasing of Section 33 of the Juvenile Delinquents Act. Of those charges which are offence specific, we note that sex and alcohol-related offences, followed by harbouring, account for the largest number of charges heard in court." 9

He also found that by 1977 over 25 percent of the charges in court were against persons less than eighteen years of age. "Furthermore, the majority of charges laid against this age group involved forms of behaviour (sex, alcohol, marijuana, helping friend hide) typical of persons in their late teens."[10] This research indicates little use of the section for parental contributing.

The Caplan study dealt with charges under section 33(1). I could find no indication in the literature, case law or from judges' interviews of any use of section 33(2).

It should be remembered that all provinces have Child Welfare statutes that attempt to deal with children whose families are not adequately meeting their needs. These statutes, being non-criminal in nature, may be the best vehicle for dealing with parents who are conducing to their child's misbehaviour by neglecting to exercise sufficient guidance or supervision over the child.

IV. STATUS OF THE PARENT BEFORE THE COURT - REQUIREMENT FOR DUE PROCESS

In a criminal proceeding a person appears before the court either as the accused or as a witness. If a person is the accused our society extends certain rights to protect that person from unfairness or over-zealous prosecution; if a person appears as a witness there are also certain rights extended but these are fewer as the person does not stand in danger of loss of freedom. It is therefore important to know what status a person has in the courtroom in order to afford that person proper protection and due process of law. It is even more important that the person know what their status is in order that they may, if they are accused of a crime, retain counsel or take other steps to properly defend themselves.

It could be argued that the parent is, in fact, not being punished vicariously for the actions of his/her child but rather is being sanctioned for the parent's own omission, namely for conducing to the offence of the child "by neglecting to exercise due care of the child or otherwise."[11]

Although section 22 purports to sanction the parent for an omission, the parents are not charged with an offence per se. They are before the court, if they appear at all, because they have received notice by section 10 of The Act. Section 10 notice merely tells the parent that the child has been charged with a delinquency and that the parent has the right to be present at the hearing. It does not command the parents' presence. Although section 22(4) states that a parent must be given the opportunity to be heard it also states that if the parent is not present but has received a section 10 notice this will be deemed to be opportunity even though this notice does not refer to potential liability of section 22.

Case law has strengthened the requirement of specific notice despite the clear language of the statute.[12]

The problem of notice aside, it still remains that section 22 purports to "fine" or impose other monetary penalty on a party who is merely an observer in the courtroom, albeit a very relevant observer. Concern with this process was raised by the 1965 Report on Juvenile Delinquency in Canada.[13]

A final consideration to be addressed in this area of due process is that of double jeopardy. Concern with double jeopardy may arise if the judge makes an order against the child as well as an order against the parent. Because the parents are not "charged" with an offence it would appear that they are being punished for the offence committed by their child; therefore, two people are being punished for what is essentially one offence. If, on the other hand, the parents are being punished for allowing their child to be a juvenile delinquent, then it hardly seems fair to also punish the child as the courts have ruled, in effect, that the child's actions are the fault of the child's parents. An American writer posed the following hypothesis: "Does the fact that the parent is guilty of causing the delinquency provide a defense for the child's act? If so, then the child has a defense and is not delinquent. Is the parent, in turn, legally absolved from responsibility?"[14]

This conundrum is very relevant to an imposition of parental liability under section 22 as that section envisages a situation where the child is found to be a delinquent and then the parent is found to be at least partially responsible for the child's behaviour because of some failing on the part of the parent. Is it rational to blame the child for his delinquent behaviour while at the same time placing blame on the parent for the child's action?

The same problem does not arise in a section 33 charge against an adult for contributing to juvenile delinquency. Section 33 requires proof that the activity of the adult may lead to delinquent behaviour but conviction does not rest on a finding of actual delinquency of the juvenile. Therefore, it is quite conceivable that an adult could be convicted under section 33 while the young person involved is not even charged with an offence.

V. USE OF SECTION 22 AS REVEALED BY THE CASE LAW

Despite the fact that section 22 has been available to Juvenile Court Judges for seventy-two years there are only three reported cases that attempt to interpret this section. Before discussing these cases the author would like to suggest some reasons why the paucity of reported case law may not reflect the actual use of the section in juvenile courts across Canada.

First, Juvenile Court is a court of first instance (i.e., a trial court) and for this very reason would generate very few reported decisions. Judges of first instance are bound by the appellant court decisions (in the case of Juvenile Court the appellant court is the Queen's Bench or High Court of the respective province) but are not bound by courts of parallel jurisdiction. Therefore, unless a case is very significant it is rarely reported unless it reaches appellant court level. This situation has changed somewhat with the establishment of the Reports of Family Law reporter series. However, this publication tends to concentrate on matrimonial and child welfare decisions rather than on the decisions issuing from the juvenile court division of the family court.

There is no appeal by right, from a Juvenile Court decision, rather, "A supreme court judge may in his discretion, on special grounds, grant special leave to appeal ..." section 37(1). This appeal is heard by a supreme court judge, "with a further right of appeal to the court of appeal by special leave of that court." The Act further stipulates that:

> "No leave to appeal shall be granted under this section unless the judge or court granting such leave considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that such leave be granted."

These limitations of appeals from Juvenile court have resulted in very few appellant decisions on the Juvenile Delinquents Act. Since it is generally appeal court decisions that are reported, this may be an explanation for the small number of reported decisions.

Second, the characterization of Juvenile court as criminal would encourage a lawyer, who chose to argue law in this court, to rely on reported case law from adult criminal court where appellant decisions on procedure and due process abound. Because the publishing of reported decisions are at least to some extent a function of the demand of the profession for these reports and since the profession would be more likely to use appellant decisions of the adult court in interpreting procedural issues than Juvenile Court decisions to make an argument, there has been little demand for a Juvenile reporter.

Third, because of the perceived nature of Juvenile court as being informal and of its convictions as having no serious consequence, very few juveniles are represented by counsel (although this may be changing). This, it may logically be argued, has resulted in very few "legal" issues being raised and therefore no real body of law being developed. The reported cases, not surprisingly, have largely concerned transfer of juveniles to adult court when charged with more serious offences; constitutional "test" cases; and liability of municipalities under section 21(2).

As well as searching every available source of reported decisions, I attended at the offices of the Chief Judge of Ontario Family Courts. On file there are a number of unreported Family and Juvenile Court decisions which the judges themselves thought significant. These are circulated to all Family and Juvenile court judges in Ontario. These decisions covered

the period from 1977 to 1980. No use of section 22 was revealed. Further, a review of all juvenile cases reported in Reports of Family Law did not reveal any use of the section.

The views of some Juvenile court judges regarding section 22 will be discussed in this paper at Part VI "Response from Judges" in order to compensate somewhat for the paucity of reported judgments.

Three reported cases were found and will be dealt with in chronological order.

Lysenko v. Cooper 1938 1 W.W.R. 366 (Manitoba's King Bench)

In this case a judge had made an order that a parent pay restitution for theft of grain which had been stolen by his sons. On appeal to the Manitoba's King Bench, it was held that before an order for restitution of stolen property can be made against a parent under section 22(1) the parent must be given definite notice, with full opportunity to defend himself, and the complainant must establish his case against the parent on evidence properly given in open sitting of the Court. Since the order in question did not meet these requirements, it was quashed.

Regina v. B. 7 D.L.R. (3d) 91 (Quebec Superior Court, 1969)

This case arose out of the disturbances at Sir George Williams University in Montreal. One set of the parents who were fined pursuant to section 22(1) were residents of New York State. The court held that the fact that the parents of the seventeen year old college student were not residents of Quebec did not deprive the judge of the jurisdiction to make an order against them under section 22 of The Act. The Court went on to find that section 37(1) of The Act (which provides for appeals) makes applicable the provisions of the Criminal Code dealing with appeals.

The Code provides that application for leave to appeal and appeals must be made by the person convicted of the offence and since there was nothing in the materials to show that the boy wanted to appeal the parents could not appeal.

The right of appeal referred to must mean that the parents cannot appeal the finding of delinquency upon which their liability is based as s.22(5) does give the parent the right to appeal any order made against them. This is a significant ruling in that a parent may not be aware of his/her personal liability under section 22 until after a finding of delinquency is made, indeed may not even have been present for the hearing. Such a parent, not understanding the consequences of a finding of delinquency, may allow a child to plead guilty where there is some possibility of a defense. The parent may reason that the child may learn from the court process and defending the child, for example on a technical or procedural point, is counter-productive in the circumstances. This type of reasoning may be inappropriate when the parent realizes that it is he or she and not the child (or as well as the child) who will be subject to the sentencing process. If a parent has not hired counsel for the juvenile and receiving notice from the court that an order under s.22 is contemplated decides that they wish to be represented, presumably an adjournment will be granted. It may be at this stage, with the assistance of a lawyer, that a legal defense may be identified. This will put the parent in a difficult situation, especially if the juvenile, being no longer in jeopardy, expresses no wish to appeal.

The finding in R. v. B. that the parents did not exercise due care and therefore conduced to their son's participation in this large

demonstration is hard to reconcile. The young man was not living at home, but rather was pursuing his education. Was there any investigation into the question of the presence of a guardian, for example a school don? Was there any real possibility that these parents failed to do something that was in their power to do, to prevent their son's participation in this event? What exactly did the parents do that conduced to this offence? These questions were not addressed by the court and therefore this decision offers us little in the way of guidelines in applying section 22. This is especially unfortunate as it is the only reported case where section 22 was upheld by an appeal court. The fact that the court did not find it necessary to make such specific findings indicates a very wide jurisdiction in imposing liability under this section. On the other hand the fact that this is the only reported decision where section 22 was successfully applied may mean it is an exception rather than a rule despite its precedent value.

The trial court decision was unreported as was the Appeal Court decision against another set of parents whose child was involved in the same demonstration as "B" and who appealed at the same time as "B's" parents. For the interest of the reader these two decisions together with a complete text of the R. v. B. decision are attached in Appendix III.

Regina v. Chapple (1976), 32 C.C.C. (2d) 324; 1977
1 W.W.R. 249 (British Columbia Supreme Court)

A juvenile under the care and custody of the Superintendent of Child Welfare was found to have committed a delinquency, a break, enter and theft of $50. The provincial court judge ordered the Superintendent in his personal capacity to pay a fine of $250. and to make restitution for damage done by the juvenile. The provincial court judge, prior to sentence, did not indicate he was considering the possibility of an order

under section 22 against the superintendent in his personal capacity. At appeal it was argued that the judge acted in excess of his jurisdiction and in breach of natural justice when no opportunity was given to the superintendent to argue the question of his liability. It was held that the failure of the judge to give the superintendent specific notice of his intention to consider liability under section 22 was fatal and the order was quahsed. Interestingly, despite the clear direction in section 22(4) that "a parent or guardian who has been duly served with notice of the hearing pursuant to section 10 shall be deemed to have had [an] opportunity [of being heard]."; the British Columbia court stated that the notice referred to in section 10 of The Act is not sufficient where personal liability is being considered against a parent or guardian.

CONCLUSION RE CASES

The cases unfortunately do not reveal any judicial interpretation of the section that would assist in evaluating when it is appropriate to penalize a parent; what standard of proof the court is requiring (i.e., criminal standard of "beyond a reasonable doubt" or civil standard of "balance of probabilities") or what defenses are available to parents. It could, for example, be argued that because the parents will not have a criminal record resulting from section 22, but rather will merely suffer a civil type penalty that a civil standard of proof is sufficient. If this is perceived as a civil remedy however, it is not appropriate for it to be in a criminal statute.

VI. RESPONSE FROM THE JUDGES

Because of the paucity of case law and lack of comment in the literature, it was decided to try, on a limited basis, to seek the opinions of Family Court Judges on the issues raised by section 22. In total, eight Family Court Judges in Toronto were interviewed by personal visit and twenty-two judges from Quebec were interviewed by telephone.

Toronto Judges

One judge interviewed in Toronto had been on the bench for eighteen years. The other seven had far less experience, ranging from nine and one-half years to three years. The average, excluding the eighteen year experience, was 5.7 years.

Only the most senior judge interviewed had ever used the section. He recalled three specific occasions where the section had been used to impose damages on parents for acts of vandalism committed by their children. He pointed out that this was not done arbitrarily, but only after close examination of the circumstances of the offence and of the parents' ability to make the payments involved. This judge stated that the section had never been brought to his attention by a prosecutor. He felt that this might be because the prosecutors, until very recently, were police officers and their orientation was less victim-centered than accused-centered. The judge said that he had frequently asked the young offender to pay some sort of restitution and was aware that sometimes this payment would be made by the parent. In conclusion, although he stated that he could understand

if this area were left to tort law, he did not want to give up any vehicle, no matter how infrequently used, that might help deal with the matters brought before the court.

When asked about s.33(2), he stated that he had never seen this section used.

Although the other seven judges had never made use of s.22, their opinions on the section are of value. All of the judges made frequent use of restitution and compensation orders against the young offenders themselves. The most common reason given for non-use was that when a situation arises such as that suggested by the section, either the situation is such that actual charges should be laid against the parent or it is a family situation that should be handled under the Child Welfare Act. There was a strongly expressed opinion that the Juvenile court should focus on the juvenile and not specifically on the parent. As stated by one Judge: "It just doesn't make sense to encourage individual responsibility but then place blame on parents". Since the adjudication focuses on the juvenile the disposition must do so also. Further, it was pointed out by several of the judges that often the financial situation of the family makes such orders totally inappropriate. One judge stated that a restitution order against a family is not in the family's best interests.

On the issue of parental fault, more than one judge expressed the view that by and large, parents of juveniles are very deeply concerned by their child's behaviour. They express feelings of hurt, confusion and frustration, and to impose the type of blame contemplated by section 22 would not be useful in attempting to help the family deal with the juvenile's problems.

Another issue raised by the judges was the problem of proof. What would have to be proved and how could it be proved? When the issue of due process was discussed, the judges admitted that this too makes use of the section problematic.

None of the judges had ever seen section 33(2) used in the courts. None of these judges seemed to be particularly committed to the use of section 22. Several said that it would not matter to them if the section was taken out of the act, but by the same token, the view was expressed that if it was restructure it might be useful, even if used very occasionally.

While interviewing the Toronto judges, it was suggested that useful information might be obtained by speaking to the Staff Sergeant of the Metropolitan Toronto Juvenile Court. This woman had served in this capacity for seven years. She expressed many of the same views as those expressed by the judges. She felt that the crown would either consider this type of situation a Child Welfare Act concern in which case use of The Act is not appropriate or, in the alternative, it would be a "contributing" situation. The trend in Toronto courts is to deal with contributing situations by laying a charge against the adult involved in adult court. She pointed out that the section appears to place the onus of proving conducement by the parent on the crown and this would make it unattractive as it would be a difficult burden to discharge.

Quebec Judges

The interviews of the Quebec judges were carried out by Gisele Graton-Legare, a Quebec lawyer employed by the Juvenile court in Montreal. Finding a lack of statistical data and in view of the huge number of cases

heard yearly by the court, she gathered her data by telephone interviews.

Data was collected from a total of twenty-two judges, eleven from Montreal and eleven from districts outside of Montreal. Four judges, representing twenty percent of the sample and thirty percent of the total years of practice of all the judges, evidenced eighty percent of the total application of the section. It is clear that application of the section was concentrated on certain judges and thus unequally distributed. The table below graphically illustrates the results of the Quebec sample:

THE QUEBEC EXPERIENCE

Judges From Montreal	Number of Applications	Years of Experience	Frequency Per Year
A	10	13	.77
B	1	13	.08
C	0	13	0
D	10	13	.77
E	0	12	0
F	0	10	0
G	0	10	0
H	0	7	0
I	1	5	.2
J	0	2	0
K	0	2	0
Judges From Other Districts			
L	10	24	.41
M	5	16	.31
N	1	15	.07
O	10	15	.66
P	0	12	0
Q	0	12	0
R	0	11	0
S	3	10	.30
T	0	10	.0
U	2	5	.4
V	0	4	0
TOTALS	53	234	4.4

It is difficult to draw conclusions from this data but it can be seen that the section is not frequently used in either Ontario or Quebec. Although it appears to be used more often in Quebec it should be remembered that over five thousand juvenile cases come before the Quebec courts a year so the application of the section fifty-three times in a total of 234 judge years is very little use indeed.

VII. CONSTITUTIONALITY OF SECTION 22

Juvenile delinquency statutes in other jurisdictions are often characterized as civil, rather than as criminal statutes[15], in keeping with the stated goal in such legislation of non-criminalization of the young person. In Canada, however, consistency of treatment for young persons across the country made it necessary to have a federal statute. The federal government enacted the Juvenile Delinquents Act under its power to control criminal law. The constitutionality of the Juvenile Delinquents Act as a whole is no longer open to question.[16] It must be emphasized, however, that this constitutionality rests on the characterization of The Act as criminal law and each section of The Act must meet this same test.

Section 22 raises two constitutional issues. First, by giving a judge jurisdiction to order "damages" and possibly "restitution", it appears to impose a civil remedy within a criminal statute. Second, this order is not made against the offender, but rather against the parent, who has not been charged with any offence. This again threatens the integrity of the section as criminal law.

It is necessary at this point to clarify the distinction made between "restitution" and "compensation". The Criminal Code uses both words with specificity. Restitution refers to an order that the offender restore property obtained during the commission of an offence to the person entitled to it. Compensation, on the other hand, refers to an order that the offender pay to the person aggrieved "an amount by way of satisfaction or compensation for loss of or damage to property

suffered...as a result of commission of the offence" (sec 653(1)).

The confusion arises because the literature uses these words differently. "Restitution" is used when referring to payment made to the victim by the offender, while "compensation" is used to refer to payment made by the State to the victim of a criminal offence. Therefore, the code makes a distinction between the type of remedy the victim may receive and the literature's distinction is based on the source of that remedy.

For the purposes of this paper I will adopt the definitions used by the criminal code, unless otherwise indicated.

The constitutionality of the compensation and restitution provisions of the Criminal Code was recently decided by the Supreme Court of Canada in the decision of R. v. Zelensky.[17] Sections 388, 653, 655 and 663 of the Criminal Code[18] give a trial judge the jurisdiction, under various circumstances, to order that a person found guilty of certain offences give restitution or pay compensation to the victim. The basis of the challenge in Zelensky, was that an order for compensation issuing from the criminal courts is ultra vires as this is essentially a civil remedy and therefore falls within the exclusive jurisdiction of the provincial government.

The court, in adopting much of the reasoning in the Law Reform Commission Paper Number 5 entitled Restitution and Compensation ruled that compensation orders were intra vires of the Federal Government. The decision stated that a compensation order is part of the sentencing

process and as such is valid criminal law. Chief Judge Laskin in his judgment quotes Paper Number 5 with approval, "not only is restitution a natural and just response to crime, it is also a rational sanction." [19] He stresses, however, that the order must relate to the offender's sentence:

> "The constitutional basis of s.653 must in my opinion, be held in constant view by a judge called upon to apply its terms. It would be wrong, therefore, to relax in any way the requirement that the application for compensation be directly associated with the sentence imposed as a reprobation of the offence." 20

Laskin, C.J., notes that, "constitutionality apart, an order for compensation should only be made with restraint and caution,"[21] and concludes it should not have been used in the case of Zelensky as the victim was obviously attempting to use the criminal law as a more expeditious way of collecting a civil debt.[22]

The constitutionality of a restitution order was not seriously challenged. Its obvious relationship to the offence and offender together with the accepted view that one should not benefit from criminal activities places this type of order squarely within acceptable dispositions of criminal offences.

This brings us to the second issue of constitutionality, i.e. accepting that there is authority within the criminal law to make orders for compensation, can these orders be made against someone who is not the offender? It is clear that the compensation order must be part of the sentencing process. The accepted goals of sentencing are punishment and rehabilitation of the offender and deterrence both to the offender

specifically and also to society in general. The imposition of responsibility for a juvenile's offences upon that youth's parents does not appear to meet any of those goals. This is especially true if the judge chooses not to make an order against the juvenile. There is no deterence for the juvenile if it is the parent who is punished by the court. Other than parental disapproval, which the child would suffer in most cases even without the court intervention, there is no reason to be deterred from undertaking similar action in the future. From this viewpoint an order against the parent would seem not only to fail to meet the stated goals of sentencing, but to undermine them. Zelensky rests the constitutionality of compensation orders on sentencing the offender, thereby making the section fall clearly within the criminal powers of the federal government. Unless section 22 can be brought within this paradigm, it may not withstand a challenge to its validity as criminal law.

Involvement of parents in the treatment of the juvenile may well fall within the scope of the statute under the ancillary doctrine of constitutional law, i.e. the doctrine that allows jurisdiction to be enlarged to carry out an otherwise valid constitutional power. This is supported especially in view of the upholding of the Juvenile Delinquents Act as valid criminal law despite its mandate to not treat the offender as a criminal, but as a "misdirected child". Even here, however, the disposition would need to be centered on the child. The concept of "punishing" parents will be discussed again in the sections of the paper dealing with literature reviews of the various jurisdictions reviewed. Part X (A) dealing with the United States literature contains the most critical analysis of this topic. It is dealt with here only to indicate how it jeopardizes the characterization of section 22 as valid criminal law in the constitutional context.

VIII. CIVIL LIABILITY OF PARENTS FOR TORTS COMMITTED BY THEIR CHILDREN

At common law a parent is *prima facie* not liable for the torts committed by his children.[23] There are three exceptions to this rule. The parent will be held responsible if the child is acting under the parent's direction or as the parent's agent; the parent will be held responsible when the act of the child is seen to be a result of insufficient parental guidance in an adult-like activity undertaken by the child (e.g. driving cars, handling weapons), and lastly, what has been called the "vicious child" cases, where a child has demonstrated a certain aggressive type of behaviour and the parents, although aware of this propensity, fail to do that which a reasonable parent would do to avoid harm falling to others because of it. Alexander states the test for this last item as follows:

> "Before a parent can be found negligent for failing to control his child he must be found to have owed the injured person a duty to control the child. This would be a duty of affirmative action. Before such a duty will be imposed the parent must have knowledge, actual or imputed, that the child's conduct is endangering the person or property of others. ...Once the duty of affirmative action is found to exist the obligation on the parent is to use reasonable care to control the child. What is reasonable care will, of course, vary with the circumstances of each case.
>
> On the other hand, sometimes the basis of parental liability will be,...that the parent actively created risk of injury to others by giving the child a dangerous instrument."24

Although the test has been clearly articulated, there have not been many occasions where the plaintiff has been successful in convincing the court that it has been met. The duty of the parent to use "reasonable care to control the child" suggests that the extent of

supervision and control to be exercised would change as the child grows older. The older a child is the more responsibility the parent imposes on the child, him/herself to perform in acceptable ways. This must be so if the child is to become a mature adult. A child under the age of six years has very little freedom from parental supervision, while a child of fifteen years comes and goes very freely within certain proscribed geographic boundaries and time limitations. It is difficult to fault a parent if a young person of adolescent age commits a tort, as the parent has so little control over that child's activities. The situation is of course different if the tort is committed with a motor vehicle or a gun that the parent allowed the child to use.

When considering the liability of parents, the Ontario Law Reform Commission concluded:

> "The Commission does not believe that any change in tort law with respect to parental responsibility is warranted. It considers that it would be unfair on parents to make them strictly or vicariously liable for damage caused by their children. Parenthood is a sufficiently demanding state in these times as it is. That a parent should be asked to do more than take reasonable care in supervision and control of their children would be both impractical and unjust. ...
>
> Parental responsibility is not, in the view of the Commission, the solution to the problem of how the loss should be borne when a child has inflicted damage on an innocent third person. As mentioned...the solution, if there is one, may lie in society assuming the burden." 25

At civil law the presumption is opposite to that of common law, i.e. "The father, and the mother after the father's death, are responsible for the damage caused by their minor children residing with

them."[26] This liability is not imposed if the parent can prove that they could not have prevented the child's action which gave rise to the liability.[27] The case law emphasizes the need for the child to reside with the parents.

The liability imposed by section 22 of the Juvenile Delinquents Act would appear to be far more onerous than the liability imposed by tort law. This is emphasized by the findings of R. v. B.[28] where parents were found to conduce to an offence even though they were not living with their child who was seventeen years old. The interface of the provincial and federal legislatures in this area could therefore produce dramatic results. Comparing, for example, the Ontario Law Reform Commission's conclusion as stated above and section 22, it would appear that the criminal law goes much further than does tort law to enforce what is essentially a civil remedy of imposing damages or costs liability on the parent of a juvenile offender. If this whole area of victim compensation for juvenile crime was actively pursued by provincial legislatures, the following options would be available. They could extend the parental liability of tort law by statute. They could enlarge the scope of the various provincial compensation boards. Another response might be the creation of a provincial offfence with a civil, i.e. tort like remedy. Despite the apparent lack of use of section 22 in the Juvenile courts no province to date has enacted a distinct statutory tort in this area, although as will be seen in Part X(B) this is precisely the route taken in most state jurisdictions of the United States.

IX. CANADIAN LITERATURE REVIEW

Although there is a vast quantity of writing in Canada concerning juveniles and the Juvenile Delinquents Act, none of this writing commented on section 22 specifically, or on parental liability in general.

There are, however, some conclusions to be drawn from the literature. If a trend can be identified from the articles reviewed, that trend would be a movement towards a due process model, focusing on the crime committed by the juvenile and the juvenile as an offender.[29] The type of procedure used in section 22 is the very antithesis of due process and further, it fails to focus on the juvenile as the individual requiring the attention of the court.

Wilson[30] points out that the parens patriae doctrine that characterizes the procedure used in Juvenile Court is essentially a civil rather than criminal approach. This may go some way in explaining the existence of civil remedies in The Act. The movement towards a due process model by adoption of a more procedurally formal statute makes the continued inclusion of these remedies inappropriate unless they can be related directly to the juvenile. As stated earlier in the paper, although many jurisdictions characterize their juvenile acts as civil legislation, our constitution demands that our act must be thoroughly criminal in nature. This must be kept in mind when considering copying legislative provisions of other countries which may be inappropriate in a criminal statute.

In an article on diversion[31] Wilson makes an interesting observation. While pointing out that under section 16 of The Act a judge can adjourn a case "sine die", he goes on to say that this is often done if the juvenile or the parent agrees voluntarily to a probation order or to restitution.[32] This may suggest that when restitution is a viable alternative for a parent it is entered into without a court order, and perhaps is an indication of at least part of the reason for the very limited use of section 22 in the courts today.

One aspect of section 22 is that the victim may be compensated for loss suffered at the hands of the juvenile offender. The author therefore researched articles in the area of compensation for victims of crime. Chase traces the history of compensation and restitution in the criminal courts and concludes that the present law of restitution is in a state of anarchy. He points to inconsistent use, lack of guidelines and problems of proof of loss. He suggests the following guidlines:[33]

1. The consideration of restitution should be restricted to the evidence presented during the trial itself, with some limited exceptions allowed for the device of 'taking offences into consideration.'

2. Difficult issues of title or liability for restitution should be left to civil courts.

3. The court should not allow itself to be used as a collection agency either for debts or damages.

4. Restitution should be restricted to relatively small amounts, except upon a plea of guilty large amounts may be considered where there is no dispute as to the amount.

MacPherson[34] emphasizes that restitution orders must be offender focused in order to maintain their integrity as part of the criminal process. He cautions that it is important not to confuse the constitutionality of compensation with the merits of compensation. This warning seems particularly relevant to use of compensation in section 22.[35]

X. AMERICAN RESPONSE TO PARENTAL LIABILITY CONCEPT

(A) Literature:

In reviewing literature in the United States three areas were considered; parental liability for actions of their children; so-called "punishing the parent" articles and more briefly the area of compensation and restitution. American writers use the term "restitution" to refer to payments made by the offender to the victim and "compensation" to refer to payments made by the state to the victim of crime. This part of the paper will adopt these usages. Of course to some extent these areas overlapped and therefore will not be discussed as entirely separate concepts.

There has been recently in the United States a great deal of interest evidenced in the area of restitution, compensation and the victim of crime. Writers in the States do not appear to embrace the concept of offender restitution with the same degree of enthusiasm as do Canadians. Although generally sympathetic to the victim many view victim's plight as a societial responsibility rather than opting for offender restitution.

The following questions indicate some concerns raised; "Does restitution change the behaviour or attitudes of the offender or victim? Does use of restitution increase the involvement of the offender with the justice system? Are private citizens or businesses the main beneficiaries of restitution payments."[36] Harland, while saying that the victim has a right to compensation finds restitution a very limited method of achieving that end. He points that the sine qua non, of restitution is apprehension of the offender and this is often not achieved. Once arrested, restitution is not often ordered as it is unfamiliar remedy and further it is generally never ordered if the offender is incarcerated.[37] Another writer states,

"In some respects the system which offers restitution as an alternative to prosecution seems even less desirable. Since it implies that the only penalty for crime is to restore what was gained, the objective of deterrence is not well served: the disincentive to commit crime is lessened if the only risk is that one may be returned to his pre-crime position."[38] This author felt, on the other hand that victim compensation, may be more appropriate as this relieves the victim of the non-payment risk and increases the incentive for crime prevention schemes. He reasoned that if the state was forced to shoulder the duty of monatarily compensating victims, whether the offender is apprehended or not, it would encourage more spending to decrease the need for these payments.

Specially in the area of Juvenile Court the concern in the U.S. as in Canada, is want of due process. Although she does not mention parental liability, Margaret Wood, points out that in many cases a restitution order made against a juvenile in Juvenile court may be too harsh a penalty or conversely if the juvenile has easy access to money, too lenient.[39] Despite this concern one group of American researchers found that 86 percent of a random sample of juvenile courts support frequent use of restitution. Only a few have specific reference to restitution in their statutes, the orders are mostly made through probation orders.[40] This referred to orders made specifically against the offender and is not significantly different than evidence gathered by this author discussed in Part VI of this paper entitled Response From the Judges.

These articles are mentioned only to help evaluate the role of restitution so that the concept of "parental restitution" for juvenile acts can be more broadly assessed.

The literature in the United States is very critical of the concept of "punishing the parents." Authors indicate that punishing parents is f[illegible]e as far as assisting the child, and in fact may have very negative ramifications in the family. The Ohio court did a 10 year study[41] of its prosecution of parents legislation. Although the study is now over thirty years old its results were often quoted. Such prosecutions were found to produce no reduction in delinquency; the judge concluded that the problems of proof and the subtleties of causation were too great for punishment of parents to be effective in reducing delinquency. Further where parental conduct consisted of omissions, punishment as a method of control "was so impracticable as to be worthless."[42] The judge noted however, that punishing parents did tend to satisfy "the blood-lust, the punitive-vindictive appetite of self-righteous non-delinquent parents, irritated, aggravated public authorities, and a substantial portion of the general public."[43] Opinion of writers have changed little over the years.

It should be pointed out that when American writers refer to "punishing parents" legislation they seem to be considering laws more align to the type of offence outlined in section 33 of our Juvenile Delinquency Act. One author spoke directly about vicarious liability:

> "Under the contributing statutes, the purpose is to protect the child. This purpose does not seem to be served by punishing the parents for passive conduct that is not criminal. If vicarious liability is imposed, than the parent is likely to be more alienated than deterred or spurred to control his child. In effect, the parent is being punished for being related to the delinquent child. The parent should only be prosecuted by the standards of true crime under which liability is based exclusively on personal causation." 44

Rubin used very strong words to argue against the concept of punishing parents in 1955; "Whenever the concept takes hold that parents who fail should be punished, it should be exposed as a delusion; wherever it has been put into practice, it should be banished as quackery."[45] The third edition of his work Crime and Delinquency[46] indicates that his views on this subject have not changed.

It was generally argued by the American authors that punishing parents was of little value, however this did not necessarily mean that there should be no parental involvement in the Juvenile Court process. In 1976 the Juvenile laws of the State of California were amended and the role of the parent was changed in a way that may serve as a useful model in dealing with the type of situation contemplated by section 22. The thrust of California legislation was summarized by Raymond F. Vincent as follows:

> "The provisions of the 1976 legislation which enable the juvenile court to make direct orders to the parent for the care, custody, maintenance and control of the minor are designed to accomplish the goals sought under the punitive approach advocated by Judge Lindsay[47] without simultaneously penalizing the parent. Under court direction and without threats of penal sanction or of custodial deprivations the parent can now be required to assume responsibility for the conduct of his child and to rectify those home conditions which have been identified as factors causually related to juvenile delinquency. He may also be ordered to participate with the child in a counselling program for the purpose of dealing with the particular behaviour problem as it affects the child's relationship to the family. The only limitation placed on such orders by the statute are that they must be reasonable and be deemed necessary and proper by the court to effectuate the disposition of the case." 48

It is interesting to note that these provisions are contained in a child welfare type statute but is seen as a method of dealing with

juvenile delinquency. Although this type of disposition involves the parent it does so in non-punitive way and further it focuses on the juvenile, the parent being used as a vehicle to assist the young offender. These two factors may well overcome the objections raised to section 22's attempt to bring the parent into the proceedings on the constitutional issues discussed earlier in this paper. Further, the type of order considered by the court in the California Statute would demand that the court carefully examine the family situation, since this could not be done without the involvement of the parents prior to sentencing due process objections would be minimized. Again, because the order would be centered on helping their child rather than compensating the victim, the parent may be less hostile to the court order which may well be viewed as a constructive assistance to dealing with a family problem.

Finally, the Standards for Juvenile Justice Project[49] that worked for almost five years to draft a Juvenile Code that could be used throughout the United States, although carefully studying the role of the parent in juvenile court rejected the idea of parental responsibility laws. It did however, set out guidelines for payment of fines and restitution for the juvenile him/herself.[50] One member indicated disagreement with any "fine" concept in Juvenile Court saying that the family always bears the burden and therefore fines should not be lieved on a juvenile.[51]

(B) Statutes:

The common law tort principles in the United States are the same as those in Canada.[52] However, the common law has been significantly altered by amendments to the state's codes. With the exception of four states, every state legislature had adopted a law making parents liable

to some degree for damage willfully caused by their unemancipated minor children.

The liability varies from state to state. Appendix II charts the laws for comparison purposes. Despite individual differences some generalizations can be made. Most of the laws were first enacted in the late fifties and early sixties. The preambles of the statutes indicate that these laws were passed specifically in response to vandalism by young persons. The intention was to curb vandalism by involving parents of offenders.

Almost invariably, compensation is by a monetary ceiling imposed by the statutes on what the victim may recover; although some state laws make it explicit that the statute does not limit any common law remedy (presumably referring to tort liability of the child and vicariously the parent). Some states make use of the section more attractive by including a jurisdiction to award costs and reasonable attorney fees on top of the maximum otherwise collectable. In all but one state (Pennsylvania) the law is typified as a civil remedy. The victim as plaintiff must bring an action against the parent of the juvenile. This seems to be at variance with the American case law which reveals that judges view this law as one to "curb vandalism" or "decrease delinquency" rather than as primarily a compensatory route for the victim.

In some states the liability created is strict but others have a codified defense of "reasonable supervision", which will protect the parent from liability if the parent can show no negligence in fulfilling her/his parental duties. Where the statute is silent on the type of liability created the courts have varied in their response.[53]

Research revealed no evaluation of these statutes or data on use of the remedy created by them. This civil remedy approach is a direct contrast to the situation where the only viable remedy to a victim of juvenile crime is to be found in the criminal statute of the Juvenile Delinquents Act. In Canada, the remedy is predicated on a finding of delinquency followed by an order for compensation or restitution directly against the juvenile as a term of probation or a finding of delinquency and subsequent order against the parent under section 22 of the Juvenile Delinquents Act.

XI. ENGLISH RESPONSE TO PARENTAL LIABILITY CONCEPT

In the late fifties the Government of England created a committee to study the court system dealing with young people. This committee issued its report in 1960.[54] This report was generally in favour of the power given to judges by the Act to impose fines on parents for actions of their children and recommended that the jurisdiction be broadened. Further, the committee noted that under the existing English act a judge could not order parents to pay compensation to the victim of juvenile offenders and recommended that this power be included in any new act.[55]

The Ingleby Committee Report was received with disappointment in England as its "reforms" were not very far reaching or innovative.[56]

In 1964 another committee under the leaderships of Longford issued a report concerning juvenile offenders entitled, Crime: A Challenge To Us All. These reports lead to the tabling of a government document on the juvenile offender in 1965.[57] In the area of victim compensation this document placed reliance on voluntarily actions by parents. Paragraph fifteen refers to voluntarily compensation by parents to the victim as an effective method of pre-disposition of the case. Paragraph eighteen states that voluntary compensation may be agreed to by the Family Council and the parent as a method of handling a case when the offender is under 16 years old. No mention of parental involvement in compensation or fines is made in dealing with the age group of 16-21 year olds, here the responsibility appears to rest solely on the young offender.

In 1969, The Children's and Young Person's Act was passed in England. This act was to revolutionize the treatment of the young offender in England. By section 3(6) an award up to a maximum of £ 100 may be made if the child commits an indictable offence which results in loss of or damage to property. If the child is under 16 years the sum is to be paid by the parent or guardian unless that person cannot be located or the parent "has not conduced to the commission of the offence by neglecting to exercise due control or care." If the child is over 16 (i.e. a "young person") then the order of the court against the parent is discretionary. Further, the offence of wilful or malicious damage to property which is a summary offence is deemed to be indictable for the purpose of this section.

In conclusion, England retained in their 1969 Act the vicarious liability section similar in tone to that which was in their 1907 statute and which in turn was adopted by our statute in 1908 and retained by Canada in 1929. Research revealed no commentary on this section.

XII. SCOTLAND'S RESPONSE TO PARENTAL LIABILITY CONCEPT

In 1964 the government of Scotland was presented with a major document that revolutionize the handling of juveniles in that country.[58] This report came to be known as the Kilbrandon Report in deference to its major author. Unlike Ingleby and Longford, Kilbrandon was strongly opposed to parental liability laws.[59]

The juvenile act in place in Scotland when Kilbrandon reported contained provision similar to the English Act, i.e. any fine imposed on a child had to be paid by that child's parents unless the parent could not be located or did not conduce to the act. Commenting on this at paragraph 27 the reports states: "it is difficult to see how, on the basis of the present rebuttable presumption, in many cases the parents, however well meaning, can be expected to discharge the onus of satisfying the court that they did not in fact fail to exercise due care of their children."

The Committee rejected the concept of fining parents saying that it is inappropriate in a statute which purports to be a system of measures for the education and training of children:

> "Fining of parents is essentially a punitive measure, and while we certainly do not wish to suggest that punishment as applied to children themself has never any educational value, the fact is that fining in these circumstances amounts to a vicarious liability on the parents, who are punished (by financial deprivation) for acts committed by their children. The educational value, in relation to parents, must in the circumstances be highly doubtful; and the argument

> that the process will be indirectly of educational value to the child we consider to be untenable." 60

The Committee was equally critical of restitution orders against parents. It noted that under Scotish law there has always been strict limitations on parental liability for actions of their children. They concluded:

> "The question of civil actions apart, we are of the opinion that it would be inappropriate, as part of the treatment measures to be applied in respect of the delinquent child, to introduce a statutory power to order the payment by parents of the cost of repairing damage done by their children ... such a proposal seems to us to assume a directness of relationship between a parent's action and the individual actions of the child which could hardly ever be established." 61

The committee noted that often the child's act is spontaneous; damage is done in places where children have easy access and therefore are beyond the parents' control. Although the committee encouraged voluntary restitution, it viewed a compulsory order as a financial sanction virtually indistinguishable from a fine "imposed in circumstances in which the parent would frequently be quite unable to regard the acts in question as arising in any definable sense from a lack of parental control on his part." 62

The Social Work Act 63 of Scotland reflected these strong recommendations of Lord Kilbrandon. It has no provisions for fines or compulsory orders or restitution against parents.

XIII. NEW ZEALAND RESPONSE TO PARENTAL LIABILITY CONCEPT

There was no literature dealing with the situation in New Zealand, however their Young Persons Act[64] reveals an approach very similar to that taken in Canada. This act appears to cover both child welfare and juvenile crime. It divides children into two categories by age; children under the age 14 years and children over 14 years but under 16 years, this latter group are referred to as "young persons".

The act gives the court jurisdiction to order the parent of an offender "to pay any person such sum as it thinks fit by way of compensation for any loss of or damage to property suffered by that person through or by reason of the offence."[65] No order can be made under the section unless the parent or guardian has been informed by the court of the proposal to make the order and has been given an opportunity to make representations to the court. The court does have the power to summon the parents to court.

It is interesting to note that in New Zealand the statute actually requires that the parents be notified of potential personal liability. This is contrasted with the less specific notice which section 22 of the Canadian Juvenile Delinquents Act allows. The New Zealand Act notice provisions parallels the type of notice demanded by the judge in the British Columbia case, R. v. Chapple cited in Part V of this paper.

The New Zealand Act also gives the court jurisdiction to make both compensation and restitution orders against the offender.

XIV. CONCLUSION

Section 22 of the Juvenile Delinquents Act appears to have two goals; first to attempt to create standards of parenting by creating a criminal sanction for neglect that leads to delinquency; second to compensate the victim of that delinquency by ordering the parent to pay for damages resulting from the offence committed by the child. Neither goal is without merit yet both appear to be inappropriate in a statute designed to deal with young people who are in conflict with society.

Criminal law should not be used to set standards of parenting. This area of human interaction is better dealt with by way of Child Welfare legislation that specifically aims at protecting children in risk situations. Agencies involved in the process are equipped to deal with the family as a unit and are constructive rather than punitive in their approach to problem situations. This would parallel the route taken in California to deal with this difficult problem.

Although the concept of compensating victims of crime, be the offender juvenile or adult, is a very attractive one, the method of accomplishing this goal must be well reasoned. In Canada, state compensation is limited to victims of violent crimes, who suffer personal injury and this of course would include violent crimes committed by juveniles. Only the personal injury is compensatable.

The Criminal Code does offer several sections that give the criminal courts power to order that an offender pay restitution to the victim. It is now clear that this order must be part of the sentencing process and be focused on the offender. The victim in this case becomes in a sense a vehicle of the rehabilitative process of the justice system.

It seems equally clear that tort law offers little to victims of crime.[66] This is even more true for victims of children's crime as the child is without assets and by and large the parent is without liability.

Despite this it is not appropriate, and perhaps illegal, to create parental liability for minors actions in the Juvenile Delinquents Act. If the parent is criminally responsible for damage done by their child they should be charged under a criminal statute and dealt with in an adult criminal court with all the procedural safeguards and penalties that failure to exercise adult responsibility carries. Civil i.e., tort like, liability could be enlarged by statute, as it has been in the United States, to attempt to provide a better opportunity for recovery for the victim. This can only be accomplished by the legislative authority of the provincial government who have the constitutional power to pass laws dealing with causes of civil action.

The federal government clearly has the authority to pass laws dealing with criminal behaviour and to create special laws for young offenders. In so doing, however, care must be taken that the nature of the statute remains clearly criminal throughout all of its sections even if the statute creates special remedies or sanctions particularly suited to the young offender.

FOOTNOTES

1. R.S.C. 1970, c.53; hereinafter The Act.

2. See Appendix I for the complete text of this section.

3. Debates of Senate: Session 1906-7, 3rd Session, 10th Parliament; Debates of Senate: Session 1907-8, Vol. II, 4th Session, 10th Parliament.

4. Debates of House of Commons 1907-8, Vol. VIII, 10th Parliament.

5. See Appendix I for complete text of section in 1908.

6. Debates of House of Commons Debates 1929, 16th Parliament, 3rd Session, 2r 2568, 2643; 3r 2648.

7. Ibid. at p.2648.

8. Caplan, Aaron, "Adults Contributing to Delinquency", unpublished, written for Research Division, Ministry of the Solicitor General Secretariat, January 26, 1979.

9. Ibid., page 21.

10. Ibid., page 23.

11. Juvenile Delinquents Act, ibid. 1, s.22(1).

12. R. v. Chapple (1976), 32 C.C.C. (2d) 324; [1977] 1 W.W.R. 249. Discussed more fully under heading Case Law.

13. Juvenile Delinquency in Canada, Report of Department of Justice Committee on Juvenile Delinquency, 1965. See particularly Part IV, Chapter X - "Criminal Liability of Parents and Other Adults." p.199-206.

14. Crime and Juvenile Delinquency, Sol Rubin, 3rd ed. 1970, see particularly Chapter 2, "Are Parents Responsible for Juvenile Delinquency?" p.21-31.

15. "Juvenile Justice and The Criminal Law Power", Larry Wilson, Sask. L.R. (1977) V. 41, p.253-267.

16. Attorney General of British Columbia v. Smith [1967] S.C.R. 702.

17. R. v. Zelensky [1978] 2 S.C.R. 940, 41 C.C.C. (2d) 97, 86 D.L.R. (3d) 179.

18. Criminal Code, R.S.C. 1970, c.C-34, as amended.

19. Ibid. 11, p.925.

20. Ibid. 11, p.960.

21. Ibid. 11, p.961.

22. For a more complete analysis of this case see: "The Constitutionality of Compensation and Restitution Provisions of the Criminal Code - The Picture After Regina and Zelensky", James MacPherson, Ottawa L.R. (1979).

23. See generally: Fleming, Torts (3rd ed., 1965), pp.23-25, 117, 118.

24. "Tort Liability of Children and Their Parents," Alexander, Chapter 14, Family Law Mendes da Costa, p.863. For a more extensive analysis see: The Family and the Law of Torts, E.R. Alexander, Butterworths, (1978).

25. Ontario Law Reform Commission Report on Family Law, Part I, Torts, Department of Justice, 1969, p.80.

26. Article 1384 of Civil Code of France, see also Article 1054 (2) of the Civil Code of Quebec.

27. "Visiting Sins of The Children", Peter Waller, (1963) 4 Melbourne University Law Review 17, particularly Part II "A Comparative Glance."

28. Supra p.24.

29. See, "An Alternate Approach for Delinquency Analysis", M. Langley, (1976) 18 Can. Jr. Crim. and Corr. 204-224. Also, "Highlights of Proposed New Legislation for Young Offenders." Attorney-General of Canada 37 Crim. Reports N.S. (1977). Also, "Models of Procedure and The Juvenile Courts", K. Catton (1976) 18 Crim. L.Q.

30. "Parens Patriae", Lawrence Wilson, (1976) 24 Chitty's, Vol. 24, No. 10, 325-333.

31. "Diversion: Impact on Juvenile Justice", Lawrence Wilson, 18 Can. Jr. of Crim. and Corr. p.161.

32. Ibid. p.165.

33. "Restitution in Canadian Criminal Law", Kenneth Chase, 36 Crim. Rep. N.S. 201-236.

34. Supra 15.

35. For further reading in this area see: "Restitution, Compensation for Victims of Crime and Canadian Criminal Law." Allan Linden, 19 Can. J. Crim. 3-49. "Revitalizing Restitution: Flogging a House that may have been killed for a just cause", John Klein, 20 Crim. L.Q. 383.

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39. "Constitutionality of Restitution Orders in Juvenile Court", Margaret K. Wood, Cincinnati Law Review, Vol. 46 (1977) p.275.

40. "Restitution Requirements for Juvenile Offenders: A Survey of the Practice in American Juvenile Courts." Eugene, Aryon: Institute of Policy Analysis, Leaa Grant (1977).

41. "What's This About Punishing Parents", Fed. Probation 23, 19 (1948).

42. Ibid. p.28.

43. Ibid. p.28.

44. "Criminal Liability of Parents for Failure to Control Their Children." 6 Valpariso Law Review 332, at p.347, (1971-72) (no author named).

45. "Should Parents be Held for Juvenile Delinquency?" Rubin, 34 Focus, 1955, 35 at p.38.

46. Crime and Delinquency, Sol Rubin, 3rd edition, 1970 Oceana Pub. See particularly, Chapter 2 - "Are Parents Responsible for Juvenile Delinquency?" p.21-31.

47. Judge Lindsey was arguing for punitive sanctions of parents who contributed to delinquency in order to make these parents more responsible to their parental duties.

48. "Expanding The Neglected Role of the Parent in Juvenile Court", Raymond F. Vincent: 4 Pepperdine Law Review, 523, at p.534.

49. Standards for Juvenile Justice: A Summary and Analysis, Institute for Judicial Administration and The American Bar Association.

50. Ibid. p.200.

51. Confronting Youth Crime, Report on the 20th Century Task Force on Sentencing Policy Towards Young Offenders. U.S. (1978) p.14.

52. "Parents Liability for Injury or Damage Intentionally Inflicted By Minor Child." Wade Habeeb, 54 American Law Review 3rd ed., 974.

53. Oklahoma: liability of parents absolute: no negligence need be shown; Memorial Law Cemetaries Association Inc. v. Carr, Okl. 540, p. 2d, 1156 (1975).
Massachutts: to extent that parent's negligence is posited on his ability to control his child, age of child is a relevant factor. Sabatinelli v. Bulter (1973) 296 N.E. (2d) 1[illegible], 3[illegible] Mass. 3[illegible].
Re Georgia Statute: case indicates that parents must be "negligent" in creating risks. (117 App. 23911) 16 OSE, 2d. 274).

54. Report of the Committee on Children and Young Persons (England) 1960 - Ingleby Report.

55. Ibid., see "Fines and Compensation" paragraph 275-276.

56. See discussion in Chapter Five: "Rethinking Social Policy" in Social Policy and The Young Delinquent, Peter Boss, London, (1967).

57. The Child, The Family and The Young Offender, Government White Paper, England 1965.

58. Children and Young Persons (Scotland), Report by the Committee appointed by the Secretary of State for Scotland, presented in 1964; (Kilbrandon).

59. Ibid., "Parental Liability in Civil Law for The Wrongful Acts of Minors", p.112-114.

60. Ibid., paragraph 22, p.15.

61. Ibid., paragraph 32, p.18.

62. Ibid., p.19.

63. The Social Work (Scotland) Act, 1968, c.49.

64. Young Persons Act 1974, No. 72, Statutes of New Zealand.

65. Ibid., s.36(e).

66. "Restitution, Compensation for Victims of Crime and Canadian Criminal Law", Allan Linden, 19 Can. J. Crim. 3 - notes that only 1.8 percent of victims studied recovered damages through the tort process.

APPENDIX

NOT FILMED